IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 48/14

In the matter between:

RP LOGISTIX (PTY) LTD	**Appellant**
and	
TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA (TAWUSA)	**First Respondent**
D TSHABALA AND 54 OTHERS	**Second and further Respondents**

Heard: **05 May 2015**

Delivered: **04 March 2016**

Summary: Voluntary retrenchment – employer relocating his business – employees incurring further traveling expenses - union requesting employer to reimburse employees for their extra traveling expenses – employer unwilling to do so - union then proposing employer pays extra traveling expenses or retrenches employees – employer electing to retrench employees – union disputing that any agreement on voluntary retrenchment entered into – proposal made by union not a serious offer – employer acting opportunistically for not accepting union's withdrawal of the proposal – no evidence of a conclusive

agreement between the parties. Labour Court's judgment upheld - Appeal dismissed.

Coram: Landman, Sutherland JJA *et* Mngqibisa-Thusi AJA

JUDGMENT

LANDMAN JA

[1] The appellant, RP Logistix (Pty) Ltd, appeals with leave of the Labour Court (Prinsloo AJ) against the whole of her judgment delivered on 11 February 2014 in which she found that the appellant and the first respondent, Transport and Allied Workers Union of South Africa (TAWUSA) acting on behalf of its members, the second and further respondents (the respondents), had not reached an agreement that they be retrenched and that consequently their dismissals were unfair.

The facts

[2] The facts presented to the court *of quo* fall within a narrow compass. Only two witnesses testified. Ms Masinamela, a HR specialist, who kept detailed minutes of her meetings with the union, testified while Mr. Tshabalala, a shop steward, testified for the respondents (applicants in the court *a quo*).

[3] The appellant's operations were located at a depot in Alrode. It sought to curb its expenses by exploring an option of renting less expensive premises in nearby Germiston. But, eventually, it relocated its operations to Isando; 25 kilometres away from Alrode. This meant that the appellant's drivers were required to travel a further 25 kilometres to work each day. This was a source of concern for the drivers. They wished to be reimbursed for their extra travelling expenses.

[4] Ms Masinamela and other company's representatives met with Mr. Madolo, a union official, Mr. Tshabalala and Mr. Nxolwana, shop stewards, on 23 February

2012. Two items were on the agenda. The one related to the retrenchment of two controllers. The other was: `Retrenchment or transfer with Imperial Group (Jhb)'.

[5] Mr. Madolo wanted the appellant to agree to reimburse the drivers for their extra travelling expenses. After some discussion, Mr. Madolo stated that if the appellant was not prepared to reimburse the drivers for their extra travelling costs, he had a mandate, meaning a proposal, that the company should retrench "all the drivers" in the company. He went on to say that the workers have provided three mandates (proposals), namely:

- Pay extra money for travelling costs; or
- Retrench all of them; or
- They will have a dispute on all the issues.

[6] Ms Masinamela replied that the appellant was not in a position to respond immediately to these proposals. Mr. Madolo said that the union required a response by the next day because a general meeting was to be held on the forthcoming Sunday. The members of the union would need to know what management's response to the proposals would be so that they could decide what to do. Ms Masinamela agreed to respond by letter on the next day.

[7] The appellant's response in its letter of 24 February 2012 began by summarising the three union's proposals and then notified the union that: "Management has considered all the above mandates and would like to confirm that we accept your mandate to retrench all employees (TAWUSA members)." The letter then sets out the appellant's proposals relating to the details of the retrenchment.

[8] The union met on Sunday, 28 February 2012. It is doubtful whether Mr. Madolo made it clear that it was the union and not the appellant that proposed the retrenchment of the drivers. Mr. Madolo formulated the employees' response in the following way:

> 'We request the company to comply with the rules of LRA by applying to the CCMA for the total retrenchment of all our members in RP Logistix (Pty) Ltd Cape Town and Johannesburg.
>
> The proposal we have addressed to yourselves are not concluded yet they are still on the table may be we might withdraw others in the near future. We urgently need some meeting in the near future.'

[9] The appellant in turn informed the union by letter dated 29 February 2012 that it had accepted the proposal made by the union on behalf of its members. It pointed out that the position regarding Cape Town was not discussed at the meeting on 23 February and said that it only accepted the voluntary retrenchment of all TAWAUSA's members based in Johannesburg.

[10] Further meetings were held between the union and the appellant. The union withdrew its proposal that all its members i.e. in Johannesburg and Cape Town be retrenched. But the appellant remained adamant that the union had requested the retrenchment of all TAWAUSA's members employed in Johannesburg and proceeded to retrench them on the basis that their union had agreed to their voluntary retrenchment.

The trial

[11] The issue in the court *a quo* was whether the parties had concluded a binding agreement that all the TAWUSA's members employed in Johannesburg would be retrenched on a voluntarily basis.

[12] The court *a quo* found that no consensus had been reached and said:

> '[72] It is evident from the testimony that there was no agreement reached between the parties and that there was no consensus on the retrenchments. The demand was for the retrenchment of all TAWUSA members and on the respondents' own version it never agreed to this demand and was not prepared to retrench the Cape Town drivers.

> [73] It is further evident from the chronological sequence of events that as from 23 February 2012 until 12 March 2012 that the demand was made but still subject to discussion, that it could be withdrawn at any time and that it was indeed withdrawn on 12 March 2012. At no point was there consensus on the retrenchment.'

[13] As the court *a quo* found that there was no agreement, the dismissal was found to be unfair.

The appellant's grounds of appeal

[14] Mr. Van der Riet SC, with him Mr. Roodt, appeared for the appellant. He submitted that the court *a quo* had come to its conclusion based on two errors of facts. These are contained in paragraphs 67 and 69 of the judgment. In essence, it is submitted that the court *a quo* erred (a) in finding that on 23 February 2012, the union proposed the retrenchment of all TAWUSA's members (i.e. Johannesburg and Cape Town members) and (b) that Ms Masinamela agreed that there was no final agreement on (or as at) 1 March 2012. I turn to discuss them in turn.

Did the union propose on 23 February that Johannesburg and Cape Town members be retrenched?

[15] When the parties met on 23 February 2012, they were dealing with an issue that only affected the Johannesburg's drivers. In this context, the proposal made by Mr. Madolo that "the company must retrench all drivers in the company" could reasonably be understood to be restricted to TAWUSA's drivers employed at Isando. The Johannesburg's drivers had further distance to travel to work; not their Cape Town counterparts. It could not reasonably be understood that Cape Town's members would be included in the phrase "all TAWUSA members". The minutes set out the backdrop to the proposal and how it was interpreted. I am satisfied that the proposal made by Mr. Madolo was, in its context, restricted to the Johannesburg's members of his union.

Is it correct that there was no agreement in place on 1 March?

[16] On the appellant's version (as pleaded), the acceptance of the proposal or offer took place on 24 February 2012 so that there was an agreement in place on 1 March. This was the evidence of Ms Masinamela. But the primary question is whether the proposal made by Mr. Madolo at the meeting on 23 February 2012 was meant and understood to be an offer which if accepted became binding as a contract. There are three telling pieces of Ms Masinamela's testimony that decisively demonstrate that Mr. Madolo's proposal was not a contractual offer.

[17] The first is Ms Masinamela's disbelief when she heard that Mr. Madolo articulated the offer. She stared at the two shop stewards in disbelief (and suggested they caucus). The second is her appreciation of the motive and nature and significance of the offer. Under cross-examination, she said that she expected the union to return from its meeting on Sunday and reject the appellant's acceptance of the proposed retrenchment. The third is that she accepts that the union members would be entitled to object to the appellant's stance i.e. its acceptance of the offer. She said that Mr. Madolo "is going to take our response to the employees for a further mandate."

[18] All this shows that the appellant knew that Mr. Madolo was posturing i.e. postulating an exaggerating response to a possible refusal to reimburse the drivers for their traveling expenses. But, notwithstanding her appreciation of the situation and that the proposal was akin to an opening gambit and not a serious offer, the appellant was quick to snatch at a bargain. And having snatched at the bargain it would not let go.

[19] The offer of retrenchment was appealing to the appellant because it had lost a contract, was experiencing financial pressure and it believed that any agreement on a travelling allowance would be open-ended and a source of continued dissatisfaction amongst the drivers leading to a disgruntled workforce.

[20] The union members' response was not a climb down from the offer but an escalation of the proposal to include even the Cape Town's members in the proposed retrenchment. Mr. Madolo did not testify but Mr. Tshabala's evidence, to a leading question by the union's counsel, was that if the appellant should insist on the retrenchment then, and only then, the appellant must also retrench the Cape Town's members. This nuanced approach indicating a rejection of retrenchment is in conflict with the union's communication to the appellant. Mr. Madolo's written response was a counter offer which the appellant did not accept.

[21] Mr. Van der Riet sought to counter the nature of the offer of 23 February 2012 by submitting that the events following that offer led the appellant to conclude that the offer was a serious offer. This may possibly have been the case had the union repeated its February offer but it did not do so. There is no evidence and no grounds for concluding that the offer metamorphosed from posturing to a sound serious offer.

[22] It follows that, albeit for different reasons, the finding of the court *a quo*, that there was no agreement that the Johannesburg's union members may be retrenched, remains undisturbed.

[23] Finally, Mr. Van der Riet submitted that the dismissal of the union members was fair as the appellant retrenched them on account of its operational requirements.

[24] It is so that the court *a quo* stopped the appellant from leading evidence regarding the financial circumstances of the appellant. I am of the opinion that the court *a quo* correctly restricted the appellant to the ambit of its pleaded defence. But, in any event, there is no application to supplement the record by leading further evidence.

[25] There is no merit in this submission. The reasons for retrenchment were based squarely on the agreement. The operational reasons were not explored even when the union conceded that its proposals for retrenchment were ill founded

and withdrew them. In its statement of defence, the respondents deny that "the dismissals occurred purely because of operational requirements". The reasons advanced during the trial indicate why the appellant snatched at the bargain of a dismissal based on voluntary retrenchment but they fall short of an independent reason for the dismissals and, importantly, an opportunity to interrogate the operational reasons was denied to the respondents prior to the dismissal of the Johannesburg union members.

The relief

[26] In his heads of argument that were filed in addition/substitution of the heads that had been filed previously and in his oral address, Mr. Van der Riet submitted that the court *a quo* failed to exercise its discretion properly when it ordered full retrospective reinstatement. It is pointed out that section 193 of the Labour Relations Act[1] confers a discretion on a court to order reinstatement "from any date not earlier than the date of dismissal". *See also Equity Aviation Services (Pty) Ltd v CCMA and Others* [2008] 12 BLLR 1129 (CC) at para 43.

[27] Neither the appellant nor the respondents placed any evidence before the court *a quo* about any income that the individual union members may have received in the 22 months following their dismissal save that Mr. Tshabalala had found employment. It is, however, correct that the union official bore some responsibility for the events by suggesting retrenchment and proposing an even wider retrenchment even when his opening gambit led to the loss of his queen. The shop stewards were also not without blame they knew that not only was Mr. Madolo not being serious with his proposal of retrenchment but they knew he had no mandate to make such an offer and they did not disown his proposal. But ultimately it was the appellant that went forward with the dismissals.

[28] Mr. Memani, who appeared for the respondents at the trial and on appeal, asked for retrospective reinstatement at the close of the trial. In the absence of evidence, the court *a quo* was correct in ordering retrospective reinstatement.

[1] Act 66 of 1995.

[29] In the premises, the appeal must fail.

Costs

[30] Mr. Memani sought an order for costs. In my view, as the contribution of the union and the shop stewards to this debacle has not yet been taken into account, it is appropriate that no order be made as to costs.

Order

[31] I make the following order:

1. The appeal is dismissed.

2. There is no order as regards costs.

AA Landman

Sutherland JA and Mngqibisa-Thusi AJA concur in the judgment of Landman JA

APPEARANCES:

FOR THE APPELLANT: Mr Van der Riet SC and Adv Roodt,

Instructed by AM Spies Attorneys

FOR THE RESPONDENTS: Adv Memani

Instructed by Lennon Moleele and Partners